



defendants' motions for summary judgment, and suspending ruling on the defendants' motions for summary judgment until after the oral arguments. On June 10, 1998, plaintiff FHC moved for Leave to File Supplemental Response and Evidence to Defendants' Motion For Summary Judgment In Light of New Third Circuit Authority on the Issue of Standing. Oral arguments on these motions took place on June 16, 1998.

## **II Discussion**

### **a. Plaintiff's Request to Supplement Record**

To be resolved initially, is plaintiff's June 10, 1998 Motion For Leave to File Supplemental Response and Evidence to Defendants' Motions For Summary Judgment in Light of New Third Circuit Authority on the Issue of Standing.

Under Fed.R.Civ.P. 56(e), "[t]he court may permit affidavits to be supplemented or opposed by . . . further affidavits." Fed.R.Civ.P. 56(e). See Chaudoin v. Atkinson, 406 F. Supp. 32, 34-35 (D.Del. 1975)(considering situation where plaintiff seeking key deposition prior to summary judgment ruling is in position that Fed.R.Civ.P. 56(e) contemplates giving opportunity to further develop record). Moreover, the Third Circuit stated in the related Montgomery Newspapers case discussed below, "it should not be insurmountably difficult for these organizations to establish standing either in their own right or on behalf of their members by referring to well-established standing principles and adjusting their pleadings and proof accordingly." Montgomery Newspapers, 141 F.3d at 80.

In two related cases the Third Circuit has recently clarified the law regarding the type and extent of harm necessarily suffered by fair housing organizations in order to

acquire standing to sue newspapers and advertisers who allegedly place discriminatory advertisements. In response to these rulings, plaintiff, in the instant case, has proffered the Supplemental Affidavit of FHC Executive Director, James Berry. The essence of the affidavit is that it purports to establish the harm suffered by FHC as a result of having to divert resources to address the allegedly discriminatory ads by showing in detail the specific amounts of time and resources diverted on specific dates. (Pl.'s Mot. For Leave To File Suppl. Resp. and Evid., Suppl. Aff.) The affidavit further attests to what projects the resources and time were siphoned away from and to what projects they were diverted. (Id.)

As the issue on summary judgment in this case is whether FHC suffered a distinct and palpable harm, this affidavit should be allowed in so that the Court may have all the facts when it makes its ruling. Accordingly, plaintiff's Motion For Leave to File Supplemental Response and Evidence to Defendants' Motions For Summary Judgment in Light of New Third Circuit Authority on the Issue of Standing will be granted.

**b. The Defendants' Motion for Summary Judgment**

Defendants' motions for summary judgment are also currently pending before the Court. The issue on summary judgment is whether FHC has shown that, as a result of the defendant's advertisements, it suffered an injury sufficient to acquire Article III standing.

Summary judgment is properly granted to the moving party if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits,

if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). A dispute regarding a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). Once the moving party has satisfied this requirement, the burden shifts to the nonmoving party to present evidence that discloses a genuine issue for trial. Id. at 324, 106 S. Ct. at 2553; Fed.R.Civ.P. 56(e).

“When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed.R.Civ.P. 56(e). In deciding a motion for summary judgment, all reasonable inferences and any ambiguities should be drawn in favor of the party against whom judgment is sought. American Flint Glass Workers, AFL-CIO v. Beaumont Glass Company, 62 F.3d 574, 578 (3d Cir. 1995). Additionally, the substantive law controlling the case will determine those facts that are material for the purposes of summary judgment. Anderson, 477 U.S. at 248, 106 S. Ct. at 2510.

The standing requirement embodied in the “case” or “controversy” provision of Article III means that in every case, the plaintiff must be able to demonstrate an injury in

fact. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992). The minimum requirement for standing to sue under the Fair Housing Act is that the plaintiff allege that as a result of the defendant's actions he has suffered a "distinct and palpable injury." Havens Realty Corp. v. Coleman, 455 U.S. 363, 372, 102 S. Ct. 1114, 1121 (1982). The United States Court of Appeals for the Third Circuit has recently issued opinions clarifying the nature and extent of the "distinct and palpable injury" necessary to meet the Article III standing requirements.

In FHC v. Montgomery Newspapers, 141 F.3d 71 (3d Cir. 1998), the same plaintiff as in the instant case, FHC, appealed the district court's order granting summary judgment in favor of the defendants. Id. at 72. The district court's ruling was based on its conclusion that the FHC lacked Article III standing to maintain the suit pursuant to the Fair Housing Act of 1968, as amended, 42 U.S.C. §§ 3604 & 3617. Id. The Third Circuit affirmed the district court with respect to the § 3604 discriminatory advertising claims, but reversed as to the § 3617 retaliation claims. Id.

In Montgomery Newspapers, the FHC had alleged that the defendants' actions in running discriminatory advertisements had frustrated the organization's mission and resulted in damage to the organization caused by the need to divert resources to fight the discrimination. Id. at 73. Specifically, the FHC alleged that its mission had been frustrated when it was forced to divert resources from its counseling and other activities to: 1) an educational campaign designed to counteract the discriminatory effect of the ads; 2) an investigation designed to determine the existence and extent of on-going discrimination in advertising; and 3) litigation. Id. at 76.

The court rejected FHC's argument that it was harmed by the need to divert

funds over the course of three years to repair the damage caused by the discriminatory ads.<sup>2</sup> Id. at 77. In doing so, the court found that the FHC was unable to establish any connection between the discriminatory ads and the need for the implementation of a remedial educational campaign. Id. at 77-78. The court noted that the FHC was unable to verify that any member of the public had been denied housing or deterred from seeking housing based on the ads, or that any member of the public had either complained about the legality of the ads or formed a misimpression about the legality of their contents. Id. at 77. In fact, the FHC was unable to show that anyone other than FHC staff even read the relevant ads. Id. In addition to FHC's failure to show the need for the educational programs, the court found that FHC failed to show that any educational programs had ever been actually implemented. Id. The court found that, although the alleged discriminatory ads had run in 1993 and 1994, FHC had not yet taken any educational countermeasures. Id. Though FHC alleged that at a future time it would be required to spend \$100,000 in newspaper advertising and \$300,000 in seminars and mailings to counter the discriminatory ads, the court found it unable to say when such measures might be taken or funds expended toward such educational programs. Id. The court found such "inchoate plans for future programs [ ] insufficient to demonstrate injury for purposes of Article III." Id.

The court also rejected the FHC's claim that it suffered a palpable injury when it

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<sup>2</sup> Prior to its analysis, the Montgomery Newspapers court noted that the case before it was different from Havens in that Havens had been examined in the context of a motion to dismiss, while Montgomery Newspapers was postured as a motion for summary judgment. Id. at 76. Thus, the court noted that while FHC's damage allegations had tracked the language in Havens sufficiently to withstand a motion to dismiss, something more than "naked allegations was required at the summary judgment stage." Id.

was forced to divert resources to investigation. Id. at 78. The investigation consisted of having FHC staff members purchase and review the classified ads of local suburban newspapers. Id. This investigation was alleged to have diverted FHC's resources which could otherwise have been used for counseling and other organizational functions. However, referring to depositions of FHC staff members, the court found that such perusals of local newspapers comprised part of FHC's normal day-to-day operations anyway, and that such operations were not limited to only the defendant's newspapers, and did not extend any longer than they otherwise might have as a result of the alleged discriminatory ads. Id. The court stated that the "investigations" of newspapers were not motivated by the advertisements at issue in the suit or by a complaint about the ads, and that FHC did not alter its operations in any way as a result of the ads.<sup>3</sup> Id.

The court found that there was no credible evidence of injury to FHC other than the dedication of funds and other resources to the pursuit of the instant litigation, and the court expressly held that the pursuit of litigation alone cannot constitute an injury sufficient to establish standing under Article III. Id. at 80. Quoting from Spann v. Colonial Village, Inc., 899 F.2d 24, 27 (D.C. Cir. 1990), the court stated: "[a]n organization cannot, of course, manufacture the injury necessary to maintain a suit from

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<sup>3</sup> The court contrasted the "investigations" in the instant case with those that took place in Havens, where the investigation and allegedly discriminatory acts were closely linked and where the housing organization "did something different as a result of the *particular* conduct which was alleged to be illegal." Id. at 78 n.5 (emphasis in original).

its expenditure of resources on that very suit.”<sup>4</sup> Id. at 79.

Thus, in holding that the pursuit of litigation alone cannot constitute an injury sufficient to establish Article III standing, the court noted, “[u]nder this standard, something more than litigation is required to establish injury.” Id. In following Spann, the court expressly rejected the plaintiff’s reliance on the more liberal decision of City of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990). Relying on Havens, the Bellwood court found that a similarly poised fair housing organization had standing to sue. The Bellwood court stated, “Havens makes clear . . . that the only injury which must be shown to confer standing on a fair housing agency is deflection of the agency’s time and money from counseling to legal efforts directed at discrimination.” Id. at 1526. In rejecting Bellwood, the Third Circuit expressly stated that Spann represents the better reasoned approach.<sup>5</sup> Montgomery Newspapers, 141 F.3d at 80.

In FHC v. Main Line Times, 141 F.3d 439 (3d Cir. 1998), another related case, the plaintiff FHC appealed the district court’s order granting a motion for judgment notwithstanding the verdict filed by the defendants. Id. at 440. The district court had granted the motion based on its conclusion that the FHC lacked standing under Article

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<sup>4</sup> The Spann court summarized the holding in Havens, “that an organization establishes Article III injury if it alleges that purportedly illegal action increased the resources the group must devote to programs independent of the suit challenging the action.” Spann, 899 F.2d at 27.

<sup>5</sup> The Montgomery Newspapers court also stated that the holding in Bellwood was *not* simply that litigation *alone* constituted sufficient injury to convey standing, but that litigation *plus* some other legal effort provided the basis for standing. Montgomery Newspapers, 141 F.3d at 80 n.7. The court noted that in Bellwood, the fair housing organization undertook an investigation of a number of real estate agencies by sending black and white “clients” to the real estate agencies to uncover illegal “steering” practices before filing suit. Id. In holding that the organization had standing, the Seventh Circuit found that the organization’s “legal efforts” to *investigate* steering were sufficient to confer standing. Id. Thus, it was the Third Circuit court’s interpretation that “litigation *plus* some other legal effort . . . provided the basis for standing.” Id. (emphasis in original).



III of the Constitution to maintain the suit brought pursuant to § 3604 of the Fair Housing Act. Id. The Third Circuit, finding that the FHC had failed to establish any “perceptible impairment” to its operation caused by the alleged discrimination, accordingly found that the FHC failed to satisfy the minimum standing requirements embodied in Article III and affirmed the district court’s order. Id.

As in Montgomery Newspapers, in Main Line Times, the FHC had sought damages for injuries alleged to have been caused by real estate advertisements placed in a local suburban newspaper. Specifically, the FHC alleged that it had suffered impairment sufficient to establish Article III standing when it was forced to divert resources from counseling and other activities to: 1) an investigation designed to determine the existence and extent of on-going discrimination in advertising; 2) litigation; and 3) an educational campaign designed to counteract the discriminatory effect of the advertisements.

Because the Montgomery Newspapers court had thoroughly discussed the first two points, and because the proof offered in that case was virtually identical to that offered and found lacking in Main Line Times, the court did not see the need to detail the proof or reiterate the arguments. Id. at 442. Rather, the court found that the proof offered with respect to the third argument -- the need for an educational campaign designed to counteract the discriminatory effects of the advertisements -- was somewhat different, and thus the court chose to address it. Id. at 443.

In Main Line Times, the FHC executive director sought to establish the FHC’s injury by testifying in essence that, because FHC had been educating the public and

realtors about discrimination for forty years, spending a tremendous amount of time and resources, when these ads appeared, they nullified or “undid” all of the hard work FHC had done up until then. Id.

Though the court recognized that the ads could have an adverse effect on public perception, thus making FHC’s job more difficult, the court, nonetheless found that the evidence submitted failed to establish the necessary causal connection between the injury and the particular advertisements. Id. In particular, the court found that evidence submitted by the FHC did not show that the ads created any adverse effects upon families seeking housing or upon the public’s perception of the ads’ legality. Id. The court stated that the evidence offered was probative only as to the effect of discriminatory advertising *generally* on landlords and realtors. Id. The court stated further that FHC’s evidence failed to show that the ads had been read by anyone outside the FHC or that the FHC was required to modify its operation in any way as a result of the ads. Id. Quoting the defendants’ brief, the court stated, “no injury to the cause of fair housing -- or consequent impairment of the Council’s programs -- could follow from the publication of advertising which was only proven to have been observed by persons who knew that it was illegal, i.e. the Council’s staff members.” Id.

Furthermore, the court rejected FHC’s position that because it holds status as a private attorney general, it need not show anything more than a violation of the Act in order to establish Article III standing. Id. The court stated, “[a]n organization acting as a private attorney general is relieved only of prudential limitations on standing and may bring suit to enforce the rights of others only where the organization itself is able to demonstrate that it has suffered injury in fact.” Id. at 444.

As in Montgomery Newspapers, the Main Line Times court felt that vigorous enforcement of the Fair Housing Act would not be impeded by its adherence to the requirements of Article III and that the case law is replete with examples of fair housing organizations which have “successfully established injury sufficient to carry them over the Article III threshold.” Id.

The issue in the instant case is virtually identical to the issues decided by the Third Circuit in Montgomery Newspapers and Main Line Times. Specifically, this Court must decide if there is a genuine issue of fact as to whether FHC suffered a distinct and palpable harm as a result of the defendants’ allegedly discriminatory advertisements. Thus, in light of the new Third Circuit authority as set forth in Montgomery Newspapers and Main Line Times, the instant issue can be narrowed further to: *besides* the resources diverted towards the instant litigation, what specific harm has FHC suffered?

In the instant case, the FHC’s arguments are identical as to the harm it has suffered: 1) the diversion of its resources to educational programs aimed at countering the ads’ effect, 2) the monitoring of local classified ads for other suspect advertisements, and litigation pursuant to § 3604 of the Fair Housing Act. In support of its opposition motion, but prior to the Third Circuit’s rulings in Montgomery Newspapers and Main Line Times, FHC had submitted the following:

1) A list of the allegedly discriminatory ads which were published in the defendant newspapers between March 18, 1989 and August 7, 1994, as well as a photocopy of each. (Pl.’s Exs. To Pl.’s Response to Defs.’ Mot. For Summ. J., Ex. “B.”);

2) A schedule of the retail advertising rates for *The Pottstown Mercury*, a defendant newspaper in which the FHC presumably intended, at some point in the future, to purchase advertising space to counter the effects of the allegedly discriminatory ads. (Id. at Ex. “A.”)

3) An unidentified document referred to as the “history” document, the purpose of which is unclear. It seems to outline, in narrative form, the housing discrimination problem and FHC’s role in addressing the problem, and concludes with a specific recommendation (to whom is unclear) for taking out advertisements in *The Pottstown Mercury* in every issue over the following three years at a total cost of \$29,671.20. There is nothing to indicate that this recommendation was ever followed. (*Id.* at Ex. “A.”)

4) Two one-page charts entitled “Diversion of Resources, the Pottstown Mercury” and then underneath on one: “(Addendum),” and on the other: “(Additional Costs).” (*Id.* at Ex. “A.”) There is nothing to indicate whether the costs shown are actual or anticipated or projected costs for both purchasing and reviewing the newspaper classified ads and then clipping and/or photocopying them.

5) The affidavit of FHC executive director, James Berry. (*Id.* at Ex. “A.”) The affidavit states that FHC “has had to divert resources to counteract defendants’ discriminatory actions and has had its mission frustrated by those actions. As a result, the FHC will have to expend funds to counteract the discriminatory message of the defendants.” (*Id.* ¶ 2.) It states further: “Plaintiff will have to expend \$29,671.20 in an educational effort by newspaper advertising. . .” (*Id.* ¶ 4.) The affidavit also states that “the FHC also has diverted at least \$14,910.98 in time and money from counseling and educational activities due to defendants’ illegal housing advertising discrimination.” (*Id.* ¶ 5.)

For the reasons discussed in both Montgomery and Main Line Times, this proffered evidence, by itself, is insufficient to show that the FHC suffered the necessary level of injury to acquire Article III standing. However, in light of those recent Third Circuit decisions, the FHC has requested leave to submit additional evidence of the harm it has suffered, which as discussed above, I will allow.

Accordingly, the plaintiff has now submitted the Supplemental Affidavit of James Berry, Executive Director of FHC. In the affidavit, Mr. Berry avers that “[t]he FHC does not as part of its normal activities investigate newspapers.” (Suppl. Aff., at 6, ¶ 4.) This is unlike the Montgomery Newspapers case, where the court found that the FHC

regularly reviews local newspapers for discriminatory ads as part of its normal day-to-day operations and that such investigations were not motivated by the advertisements at issue. Montgomery Newspapers, 141 F.3d at 78. Rather, in this case, Mr. Berry avers that, “As a result of learning of the illegal ads . . . I determined that the FHC would divert from its normal activities and read each paper’s classified advertising section.” (Suppl. Aff., at 6, ¶ 4.) He states further, “[a]s a result of the illegal ads found in the first issue reviewed, I was forced to direct the staff to continue diverting itself from its counseling and education activities and begin a prolonged investigation of the Mercury to identify the extent and nature of the Mercury’s discriminatory activity.” (Id. at 6-7, ¶ 6.)

Moreover, the Berry affidavit is specific about the activities from which resources were diverted. Berry avers that if he and his staff had not had to divert resources to review the newspaper ads, they would have been:

gathering data for Delaware County’s Comprehensive Housing Affordability Strategy, drafting a proposal for Bucks County funds for fair housing education and enforcement, responding to board inquiries, organizing education efforts, scheduling and preparing for attendance at conferences and lectures, preparing for and running a fair housing compliance seminar for Community Alliance for Affordable Housing, preparing for National Fair Housing Summit in Washington, D.C., and developing a proposal to Montgomery County to conduct education.

(Id. at 2-5, ¶ 2.)

In addition, the Berry affidavit documents the educational efforts actually undertaken by FHC to counteract the effects of the allegedly discriminatory ads. Mr. Berry avers that, “[a]s a result of the illegal advertisements, I had to order my staff to also divert their time and the FHC’s resources from education and counseling to

education efforts to counteract the discrimination.” (Id. at 11, ¶ 10.) He states further, “[a]s a result of the illegal ads, I had to teach the law, the meaning of the law, and the method to follow the law.” (Id.) Specific educational efforts aimed at countering the effect of the ads included:

- a) a forty-five minute lecture on September 30, 1993 to the National Federation of Manufactured Housing on the illegal ads;
- b) a thirty-minute discussion on November 5, 1993 with Marilyn Wood of the Pennsylvania Department of Community Affairs on the illegal ads;
- c) a thirty-minute lecture on December 10, 1993 to the Community Alliance for Affordable Housing at the Montgomery County Planning Department on the illegal ads;
- d) a thirty-minute lecture on June 11, 1994 to the Pennsylvania Manufactured Homeowners of America Annual Meeting on the illegal ads;
- e) a five hour seminar on June 15, 1995 for the Chester County Board of Realtors on the illegal ads;
- f) a fifteen-minute lecture on November 17, 1995 to the Equal Opportunity Committee of the Delaware County Association of Realtors on the illegal ads;
- g) a three and a half hour presentation on September 25, 1996 at the Pennsylvania Association of Realtors Annual Meeting on the illegal ads; and
- h) a thirty-minute lecture on April 2, 1997 to the Delaware Valley Association of Realtors on the illegal ads.

(Id. at 12-16, ¶ 11.)

This is in marked contrast to the Montgomery Newspapers case where the court found that the only evidence relating to the implementation of an educational effort was the FHC’s “inchoate plans for future programs,” and where the “FHC admitted that it has yet to undertake any educational effort countermeasures . . . directed at reversing the damage alleged to have been caused by the advertisements.” Montgomery Newspapers, 141 F.3d at 77. Moreover, in this case, Mr. Berry states that he had to engage in extensive discussions about the law with the people he encountered at these educational efforts who had read the ads and who did not understand them to be illegal.

(Suppl. Aff., at 18, ¶¶ 13 & 14.)

Thus, I find that, under the standard recently enunciated by the Third Circuit in Montgomery Newspapers and Main Line Times, the plaintiff has created a genuine issue of fact as to whether it suffered a distinct and palpable harm as result of the defendants' advertisements. Accordingly, the defendants' motions for summary judgment will be denied.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

THE FAIR HOUSING COUNCIL OF	:	
SUBURBAN PHILADELPHIA,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
	:	
v.	:	No. 96-1382
	:	
	:	
MERCURY, PEERLESS PUBLICATIONS,	:	
INC., BARRY HOPWOOD, MARY ANN	:	
EDLEMAN, GILBERT REAL ESTATE,	:	
CAROL GOREY, PRUDENTIAL REAL	:	
ESTATE AFFILIATES, INC., WILLIAM J.	:	
HNATH, WILLIAM J. HNATH CORP.,	:	
	:	
Defendants.	:	



## **ORDER**

AND NOW on this 17th Day of August, 1998, upon consideration of plaintiff's Motion for Leave to File Supplemental Response and Evidence to Defendants' Motions for Summary Judgment in Light of New Third Circuit Authority on the Issue of Standing, and the defendants' response thereto, and upon consideration of the defendants' motions for summary judgment, and the plaintiff's responses thereto, and for the reasons stated in the accompanying memorandum, it is HEREBY ORDERED that:

1) the plaintiff's Motion for Leave to File Supplemental Response and Evidence to Defendants' Motions for Summary Judgment in Light of New Third Circuit Authority on the Issue of Standing is GRANTED; and

2) the defendants' motions for Summary Judgment are DENIED.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.